

# Implementing the RESTORE the Gulf Coast States Act: Key Considerations and Opportunities

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## SEMINAR SUMMARY

The 2010 *Deepwater Horizon* disaster harmed the natural resources, communities, and economies of the Gulf Coast. The resulting oil spill also triggered civil and criminal penalties under the oil discharge prohibitions of the federal Clean Water Act. Civil penalties alone could total over \$17 billion. On June 29, 2012, Congress passed the Resources and Ecosystem Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act (also known as the "RESTORE Act") as part of the Surface Transportation Bill. The RESTORE Act will direct eighty percent of the Clean Water Act civil penalties from the *Deepwater Horizon* incident to environmental and economic restoration and research in the Gulf region.

This seminar brought together experts to discuss the key considerations and opportunities ahead in implementing the RESTORE Act, including what the RESTORE Act could mean for the environment, economies, fishing communities, and citizens of the Gulf Coast states.

### Panelists:

- **George Cooper**, Senior Vice President, Forbes-Tate
- **Brian Moore**, Legislative Director, National Audubon Society
- **Cyn Sarthou**, Executive Director, Gulf Restoration Network

### Moderator:

- **Megan Herzog**, Law Fellow, Environmental Law Institute

Ms. Megan Herzog began the panel with an overview of the Resources and Ecosystem Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (also known as the "RESTORE Act").<sup>1</sup> Congress passed the RESTORE Act on June 29, 2012 as part of the Surface

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<sup>1</sup> See the Environmental Law Institute's summary and in-depth analysis of the RESTORE Act, available at [www.eli-ocean.org/gulf/clean-water-act-restore/](http://www.eli-ocean.org/gulf/clean-water-act-restore/).

Transportation Bill, and President Obama signed it into law on July 6, 2012. RESTORE directs eighty percent of administrative and civil penalties levied under the Clean Water Act (CWA) in connection with the 2010 *Deepwater Horizon* oil spill to broad restoration in the Gulf. Ms. Herzog explained that the United States has filed a lawsuit seeking CWA penalties from the responsible parties for the oil spill. One of the parties, MOEX Offshore 2007 LLC, has agreed to pay the United States \$45 million in civil penalties. Estimates of total CWA civil penalties related to the *Deepwater Horizon* oil spill are in the billions of dollars.

Ms. Herzog described how funds administered under RESTORE will go to four separate pots:

- Just over one-third of the funds will go directly to the five Gulf states, in equal shares, to be used for ecological and economic restoration. States can only use the funds for specific purposes, including restoration of natural resources, workforce development, job creation, tourism promotion, promotion of Gulf seafood, and flood protection. Each state will be required to develop a science-based implementation plan that describes how selected projects meet the goals of the RESTORE Act.
- Using almost one-third of the funds, the RESTORE Act will create a Gulf Coast Ecosystem Restoration Council, whose members will be federal officials and the Gulf state governors or their appointees. The Council's funds will go toward developing and implementing a comprehensive science-based plan, which can only include projects to restore and protect natural resources.
- Almost one-third of the funds will be divided between Gulf states according to how severely each state was affected by the oil spill. In order to receive funds, states must develop funding plans listing the projects that will receive funds. State plans may include both environmental and economic recovery projects.
- The last roughly five percent of the funds will go to research. RESTORE establishes a Restoration Science Program to fund monitoring efforts to ensure the long-term sustainability of Gulf fisheries. Additionally, one Center of Excellence will be established in each Gulf state to further Gulf Coast science, monitoring, and technology. The Centers will be housed by nongovernmental organizations, consortia, or universities, and research projects will regard ecological restoration and economic recovery.

Mr. George Cooper followed by discussing major players in the sportfishing community, including the Theodore Roosevelt Conservation Partnership (TRCP), the Coastal Conservation Association (CCA), and the American Sportfishing Association (ASA). The sportfishing community has a strong economic presence in the Gulf. Salt-water fishing contributes \$8 billion and 82,000 jobs to the region. In the course of a year, roughly 3.6 million anglers fish over 40 million days in the Gulf. Sportfishing interests frequently overlap with environmental interests, particularly following the 2010 *Deepwater Horizon* disaster.

Mr. Cooper discussed sportfishing groups' efforts to identify and set Gulf Coast restoration funding priorities for available funds administered through the Oil Pollution Act's natural resource damage assessment (NRDA) process, the RESTORE Act, or other sources. In spring 2011, the Gulf Spill Recreational Fishing Response Group published its [\*Recommendations for Resource and Recovery\*](#), which

outlines consensus priorities for restoration and recovery investments, including: long-term funding to address latent resource and economic impacts, an endowment fund mechanism similar to Senator Whitehouse's proposed National Endowment for the Oceans, Coasts, and Great Lakes, and improved stock assessment data. Mr. Cooper noted that baseline data on offshore marine species (e.g., Bluefin tuna) and habitat is particularly inadequate. Limited funding and inefficient use of funds has hindered National Oceanic and Atmospheric Administration (NOAA) monitoring efforts. The report also included guidelines on distinguishing recreational fishing from tourism, and implementing commercial fishing measures and regulations (e.g., the report recommends the use of "buyouts"—purchasing fishing vessels and/or fishing permits in an attempt to reduce overfishing).

Mr. Cooper reviewed the RESTORE Act's purpose and restoration mechanisms. The sportfishing community is glad that a portion of the RESTORE Act funds will be directed to Gulf restoration monitoring and science programs. Sportfishing groups will continue to advocate for an endowment to support further research. Mr. Cooper identified three restoration monitoring, science, and technology project areas that the sportfishing community supports: (1) habitat, (2) data and science, and (3) economics. In the area of habitat, the sportfishing community will push for investment in blue water offshore research to address oil spill and systematic impacts. The sportfishing community will also support "rigs to reefs" habitat protection projects that mitigate the negative impacts of the Department of the Interior's "idle iron" policy, as well as projects related to oyster bed restoration, saltwater intrusion mitigation, wetland restoration, recreational fishery impact, stock assessments, restoration monitoring, and marine stock enhancement (e.g., research at Mote Marine Lab). In the area of data and science, the sportfishing community will push for enhanced coordination between research bodies. For projects that fall under the economic category, projects that emphasize and distinguish recreational fishing are priorities for the sportfishing community.

Mr. Cooper concluded with a discussion of the challenges that face the sportfishing community. To ensure funds are properly allocated to the best projects, the community will promote investments in foundations such as the National Fish and Wildlife Foundation and the Fish America Foundation. As a disparate community, it must work to speak with a unified voice. Sportfishing stakeholder meetings and a follow-up Gulf Spill Recreational Fishing Response Group report will help develop and fine-tune the community's voice.

Ms. Cyn Sarthou followed by providing a general overview of the Gulf Restoration Network, which has supported Gulf restoration over the last seventeen years and has been heavily involved with restoration following the 2010 *Deepwater Horizon* disaster. The Gulf Restoration Network is a member of the Gulf Future Coalition, of which several members did not support RESTORE.

Ms. Sarthou explained that the Gulf has suffered from many environmental damages in addition to oil spill impacts, including overfishing, degradation, and inadequate ecological monitoring. The RESTORE Act provides support for the Gulf region and addresses deeper systematic issues that have long

concerned environmental groups. RESTORE funds also can be leveraged to foster a restoration economy.

Ms. Sarthou noted that the Gulf Restoration Network and other Gulf Future Coalition members are cautiously optimistic about RESTORE, because its passage is only the beginning of a journey to ensure that funds are spent in an effective and appropriate manner. While RESTORE funding is certainly coming, when and how much funding will be allocated is unknown. Litigation may delay available funds, and the Department of Justice may settle for penalties less than desired. Engaging in and watching the process is essential to ensure RESTORE funds reach the best restoration projects. Ms. Sarthou cautioned that while the current focus is on environmental restoration and science, permitted economic development projects – such as flood control, port development, and tourism – are expensive and will compete for available funds. Environmental restoration and science projects need to be prioritized over economic efforts.

Ms. Sarthou explained the Gulf Coast Ecosystem Restoration Council’s affirmative decision-making structure, whereby decisions are made by a majority of the Gulf states and a federal chair. The federal chair, representing all federal agency member interests, must actively consider federal interests holistically rather than the interests of a specific agency. She also encouraged increased public engagement in the decision-making and project implementation process. Communities hardest hit by systematic environmental impacts need to be prioritized, and to receive restoration funds to enhance their resilience and sustainability. The public, acting as a watchdog, can ensure funds are properly administered to appropriate projects. Ms. Sarthou concurred with Mr. Cooper on the need to improve baseline data on offshore marine species and habitats. She emphasized that the 2010 *Deepwater Horizon* disaster occurred in federal waters, and impacts to federal waters must be given attention as well as state impacts.

Mr. Brian Moore lauded Congress for establishing the largest restoration fund in Congressional history under RESTORE, and acknowledged that now is the time to look forward. Mr. Moore discussed the National Audubon Society’s individual role in Gulf Coast restoration and membership in a large coalition of environmental groups dedicated to Gulf restoration. Audubon owns land in each Gulf state, including 26,000 acres off of the Louisiana coast, where Audubon conducts modeling and restoration science to inform agency officials, such as the U.S. Army Corps of Engineers, on best restoration practices in the Gulf region. Audubon expects to apply for RESTORE funds to support its restoration and modeling projects. Although some key components were stripped, such as Senator Whitehouse’s National Endowment for the Oceans, Mr. Moore stated that Audubon Society is content with the version of RESTORE that was passed.

Mr. Moore concurred with Ms. Sarthou that large scale infrastructure and economic projects may divert funds from restoration projects. Many federally authorized projects are unfunded, such as the “LCA 6,” six Louisiana Coastal Area infrastructure projects authorized by the federal Water Resources Development Act. Local governments perceive RESTORE funds as opportunities to continue

infrastructure development. Mr. Moore emphasized that directing funding toward the best restoration projects is essential. States and local parishes can develop and prioritize project lists, such as the project list developed under Louisiana's State Master Plan, which is revised every five years. Making sure the local parishes and states work to push these projects forward is important. Potential restoration projects may include using land acquisition tools.

Mr. Moore concluded by noting that Audubon will work with the Gulf states on specific restoration projects, specifically on determining what those projects are, what states want, how much projects will cost, the science behind projects, and expected outcomes. At the federal level, Audubon will attend meetings and collaborate with the Gulf Coast Task Force and Gulf Coast Ecosystem Restoration Council to get the best projects in front of decision-makers.

### **CONCLUDING THOUGHTS**

Mr. Cooper stressed that the restoration process requires long-term vigilance given the uncertainty of when the CWA funds will become available. Clarifying desired project areas and specific projects will help the sportfishing community better influence decision-makers. Coordinating and developing a consensus with environmental groups on overlapping interests can support stronger influence in the process. Restoration projects that develop baseline data in federal waters must be prioritized.

Ms. Sarthou followed by emphasizing that RESTORE funds will be the largest amount of money given to the Gulf and likely any restoration initiative in the nation. This opportunity requires public engagement to ensure funding is directed to the best restoration projects.

Mr. Moore concluded by thanking ELI for its analysis of different versions of the RESTORE bills.

### **QUESTIONS & ANSWERS**

*Could you clarify whether the funds from RESTORE include NRDA funds in addition to CWA funds?*

Ms. Herzog answered that RESTORE Act funds are separate from NRDA funds. Under the Oil Pollution Act, BP and other responsible parties pay to restore damages inflicted by the oil spill on natural resources. The legal process of identifying and quantifying natural resource damages is called a natural resource damage assessment (NRDA). NRDA funds can only be used to restore natural resources damaged by the oil spill. Responsible parties for an oil spill may be separately liable under the CWA for oil discharges that pollute U.S. waters. Under the CWA, liable parties pay punitive penalties that, in the absence of RESTORE, would go to the Oil Spill Liability Trust Fund. RESTORE redirects CWA civil penalties to Gulf restoration. Unlike NRDA funds, which reimburse the public for damages to natural resources caused by the oil spill, RESTORE Act funds can be used for a broad range of restoration projects related to long-term ecosystem degradation as well as oil spill recovery.

*A seminar participant noted that most of the discussion centered on local and state efforts, even though Gulf restoration is a federal and regional issue. Are there regional efforts to restore the Gulf? What does “enhancing and establishing resiliency” mean?*

Ms. Sarthou stated she anticipates that the Council and its comprehensive plan will take a larger, regional look at Gulf environmental restoration efforts. For example, the Council is required to consider the Gulf Coast Ecosystem Restoration Task Force’s findings and identified restoration projects, both of which include regional restoration analysis.

Ms. Sarthou defined “resiliency” as having the tools to survive future events, such as sea level rise, and to sustain economic bases. Many Gulf Coast communities are susceptible to environmental and economic risk because of the 2010 *Deepwater Horizon* disaster, hurricanes, and long-term wetland degradation. Enhancing community resiliency will enable these Gulf Coast communities to be safe and sustainable well into the future.

Mr. Cooper stressed the importance of regional coordination to address Gulf Coast restoration issues, such as the Gulf dead zone. Academic and scientific research institutions need to collaborate. The Council federal chair can also advise states and agencies to coordinate.

*How does the Gulf Coast Ecosystem Restoration Council decision-making process work? What happens when projects come in? Are projects prioritized? Are there timelines for project consideration?*

Mr. Moore answered that the decision-making process has not been clarified. RESTORE requires the Council to develop its comprehensive plan within a year of enactment. Nonprofit groups anticipate attending meetings and working with the Council and the federal, state, and local governments on how to distribute funds.

*In addition to Louisiana’s Master Coastal Restoration Plan, do other Gulf states have restoration plans? If not, are there any plans in development? If so, are any of the plans exceptionally good or bad models?*

Ms. Sarthou highlighted that Mississippi has a strong Coastal Improvement Plan, developed by the U.S. Army Corps of Engineers. The plan focuses on ecosystem restoration and community voluntary buyouts necessary to increase storm protection and provide ecosystem restoration benefits. Mr. Moore discussed informal project lists developed at the grassroots level by local communities, citizens, and nongovernmental organizations. These informal project lists often are not available to the public.

*What implications does RESTORE have for the NRDA process? If RESTORE is separate from NRDA, why can RESTORE funds go to oil spill recovery projects?*

Ms. Sarthou explained that RESTORE is not intended to replace NRDA. Obtaining NRDA damages requires the Natural Resource Trustees to show a direct nexus between an injury to natural resources and the 2010 *Deepwater Horizon* disaster. This causation hurdle frustrates states, especially given the inadequacy of baseline data about the Gulf Coast ecosystem, which is necessary to demonstrate damage. RESTORE provides flexibility to address long-term, systematic impacts in the Gulf.

*With respect to monitoring fisheries, do you think this monitoring will or should include monitoring the economic and social well-being of individuals, businesses, and communities who benefit from the fisheries in the Gulf?*

Mr. Cooper answered that the federal Magnuson-Stevens Fishery Conservation and Management Act requires NOAA to have baseline economic data on recreational fishing and businesses. Similar to key marine fisheries, baseline data on recreational fisheries is inadequate. Mr. Cooper suggested funds for recreational fishing data may be appropriate under either NRDA or RESTORE.

*How do local governments fit into the funding structure? What should we be thinking about and looking out for as the funds given to local parishes are spent?*

Ms. Sarthou stated that RESTORE describes how Florida and Louisiana local governments will receive a percentage of the funds distributed to the states. In order to receive their share of funds, Louisiana parishes must develop comprehensive land use plans and long-term project implementation plans. Nonprofit groups in Louisiana need to ensure that local parishes incorporate local needs, as identified in the Louisiana Master Restoration Plan, into local land use and long-term implementation plans. The Gulf Restoration Network will identify local parishes with restoration funds, work with local parishes on establishing project lists, and collaborate with local workforces.

Ms. Sarthou expressed concern over RESTORE's broad local hiring provisions, enabling the hiring of companies with limited connection to the Gulf Coast. It is incumbent upon local governments to ensure project contracts are awarded to local companies or companies that hire local workers.

Ms. Herzog followed by noting that the public participation provisions in RESTORE are similarly broad, and asked how the Council and Gulf states can best incorporate the views of citizens and organizations?

Ms. Sarthou explained that the Council is entitled to develop task forces. She noted that the Gulf Coast Ecosystem Restoration Task Force established a citizen's advisory committee made up of a range of stakeholders, including local businesses, recreational and commercial fishing, and environmental groups. Ms. Sarthou recommended that governments engage the public throughout the process, not

simply after project lists are created. For example, many Gulf states have effectively included the public in early restoration by holding meetings with interest groups before they developed lists, posted priorities, allowed public input before finalizing project lists, and published project lists. Ms. Sarthou fears that establishing task forces will constitute sufficient public engagement under RESTORE even if task force membership is non-representative and public engagement consists merely of presenting and defending project lists.

*A seminar participant noted that the Council's affirmative voting process permits a majority of the states and the federal chair to make a majority of the decisions in the absence of other members. Who is eligible to solicit funds from the Council?*

Mr. Moore acknowledged that predicting public and agency engagement processes is challenging when the Council make-up and internal structural has not yet been determined. Mr. Moore anticipates that all stakeholders will have participation opportunities. Stakeholders can weigh in on the Council's initial comprehensive plan as well as when the Council revises the plan. The high profiles of each Council member and the amount of funds involved will enhance fairness within the decision-making process.

Ms. Sarthou agreed that the Council's high profile status will increase accountability and fairness. Ms. Sarthou reiterated, however, that it is incumbent upon the federal chair to actively represent all agencies, as inter-agency political and jurisdictional conflicts are frequent obstacles to collaboration. Given the Council's high profile and agencies' prioritization of ecosystem representation, a stronger foundation for agency collaboration is in place.

*A seminar participant expressed her satisfaction that Congress included "science" throughout the RESTORE Act, and mentioned her disappointment that Congress stripped some of the "coordination" between the Council and Centers for Excellence from the bill. Following on her comment, the seminar participant asked three questions. How can agency academics and scientists inform the Council? How can the Centers coordinate with the Council and NOAA that is setting up the research program? How can we ensure that NOAA's research program takes a broad ecosystem-based approach?*

Mr. Cooper emphasized the importance of strengthening coordination. The Centers of Excellence offer a structure for coordination and can be connected with the Council. The sportfishing community has not brainstormed coordination strategies, and is looking for ideas to support. Ms. Sarthou concurred.

*What could happen if we do not coordinate RESTORE Act funded projects with other existing restoration projects? How can we ensure everything is well-coordinated?*

Mr. Cooper restated that the sportfishing community supports coordination efforts, but has not brainstormed possible strategies. Ms. Sarthou explained that the RESTORE Act requires the Council to look at ongoing restoration efforts and to produce a list of projects within 180 days of enactment. The project list will be most effective if it describes larger restoration efforts that the Council can take advantage of rather than simply listing potential projects. Through public commenting on the comprehensive plan and project lists, the public can identify and inform the Council of ongoing Gulf Coast restoration projects that deserve funding.

*What can citizens watch out for to ensure the funds go to positive effects in the Gulf? What can citizens do if they are disappointed by the decision-making process?*

Ms. Sarthou stated that the public needs to be continuously engaged and involved in the process. Local governments will push for particular economic projects that consume funds and may have negative environmental impacts, such as building conference centers or dredging to deepen port facilities to take advantage of Panama Canal shipping traffic. The public can communicate with local coastal groups to stay informed, contact state panels, and develop a constituency. While RESTORE does not have a citizen suit provision, litigation may also be a tool if a suit can be brought under a separate environmental statute, such as the National Environmental Policy Act.

*What is the relationship between the Gulf Coast Ecosystem Restoration Task Force and the Council?*

Mr. Moore described the Gulf Coast Ecosystem Restoration Task Force that was set up after the BP oil spill under the Guidance of Ray Mabus, Secretary of the Navy and former Governor of Mississippi. The Task Force developed [a Regional Ecosystem Restoration Strategy](#), which supported the idea of redirecting 80 percent of CWA penalties to Gulf restoration. The Strategy considered additional problems and systematic issues.

As a concluding thought, Mr. Cooper described a multi-stakeholder long-line fisheries project that incorporates environmental, sportfishing, and commercial fishing interests. Long-line fisheries have a bycatch problem, unintentionally catching tortoises, seabirds, Bluefin tuna, and other unintended species. The project proposes to restore affected species populations through buyouts and gear shift incentive programs. Mr. Cooper hopes the project will receive either RESTORE or NRDA funding.

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